IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1069 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge

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MUSABHAI AHMEDBHAI DHUDHIA - Appellant(s)

Versus

STAT OF GUJARAT - Opponent(s)

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Appearance :
MR BS PATEL with Ms. Kiran Pande, for the Appellant.
MR PD BHATE, APP, for the respondent-State.

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE
and
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 19/06/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

1. By this appeal, the appellant challenges the judgment and order passed by learned Sessions Judge, Bharuch, on 26th November, 1996 in Sessions Case No.107 of 1996, convicting the appellant for offences punishable under Section 302 of the Indian Penal Code and Section 135(1) of the Bombay Police Act. The learned Sessions Judge sentenced the appellant to undergo rigorous imprisonment for life and to pay a fine of Rs.1000/- and, in default, to undergo rigorous imprisonment for further period of six months for the offence punishable under Section 302 of I.P.C. The appellant is also sentenced to undergo rigorous imprisonment for four months and to pay a fine of Rs.500/- and, in default, to undergo rigorous imprisonment for a further period of three months for the offence punishable under Section 135(1) of the Bombay Police Act.

2. The appellant is alleged to have committed murder of his brother, Valimohmad Dudhiya, on 11.11.1995, at about 17.55

hours, at village Sitpone, in front of their house, by inflicting knife blows on the deceased.

2.1 As per the prosecution case, the appellant and deceased-Valimohmad Dudhiya, were blood-brothers. The appellant was staying on the first floor of the house, whereas the deceased was occupying the ground floor. The appellant has a sister, who was staying with the deceased. The relations between the brothers were not good. On the day of the incident, firstly, at about 5.00 P.M., there was a quarrel between the two brothers, neighbours intervened and separated them and the appellant was sent to his home on the first floor. When the deceased was parking his hand-cart, suddenly, the appellant came from his house with a knife and inflicted two blows on the left side of trunk of the deceased. The deceased fell down immediately and was profusely bleeding. At that time, as per the prosecution case, Yunus Adam Talati, Yunus Vali Mogra and Adam Ahmad Vania, who were in the vicinity, caught hold of the appellant, took away the knife from him and then took Valimohmad Dudhiya as well as the appellant to Bharuch Civil Hospital in auto-rickshaws. Unfortunately, the

deceased succumbed to the injuries while being taken to the hospital and was declared dead by the doctor on reaching the hospital. It appears that the appellant had also injuries on the back of his head as well as in the face and was treated therefor. An F.I.R. was lodged in respect of this incident by Yunus Adam Talati. It appears that the appellant also lodged an F.I.R. alleging that the deceased had caused injury on his head with a brick.

2.2 The Police registered the offence against the appellant and having found sufficient material against him during the course of investigation, filed charge sheet in the Court of learned Chief Judicial Magistrate, Bharuch, on 15th February, 1996. Criminal Case No.6517 of 1996 was registered. However, as the offence alleged against the appellant were exclusively triable by Court of Sessions, the case was committed to the Sessions Court and Sessions Case No.107 of 1996 came to be registered.

2.3 Learned Sessions Judge framed charge against the appellant at Ex.2 for offence punishable under Section 302 of the I.P.C. and section 135 of the Bombay Police Act. The appellant-

accused pleaded not guilty to the charge and came to be tried.

2.4 During the course of the trial, the prosecution led its evidence. The accused-appellant also adduced evidence by examining a witness as well as he himself entering into the witness box.

2.5 The accused-appellant took a plea of exercise of right of private defence. Learned Sessions Judge, however, after considering the evidence as a whole, came to a conclusion that the prosecution was successful in establishing the charges levelled against the accused-appellant and recorded conviction while not accepting the plea of the accused-appellant of exercise of right of private defence. The learned Judge recorded conviction for offences punishable under Section 302 of the I.P.C. and Section 135 of the Bombay Police Act and passed the order of sentence, as stated hereinabove.

2.6 Aggrieved by the said judgment and order, the accused-appellant has preferred this appeal.

3. The appellant is represented by learned Advocate, Mr. B. S. Patel, appearing with Ms. Kiran Pande. Respondent-State is represented by learned Additional Public Prosecutor, Mr. Bhate. The record and proceedings are before us.

4. Learned Advocates appearing for the appellant submitted that the Trial Court committed an error in not accepting the plea of the appellant about exercise of right of private defence. It is submitted that it cannot be denied that the death of the deceased was neither natural nor suicidal nor accidental. The death has occurred in a transaction where the appellant apprehended risk to his own life or risk of grievous hurt being caused to him and, in order to avert the causing of such injuries, was required to use his right of private defence. While exercising the right of private defence, the injuries were caused to the deceased, to which he ultimately succumbed. The case cannot, therefore, fall within the ambit of definition of murder. It is submitted that the Trial Court ought to have appreciated the evidence placed before it as a whole. The Trial Court has

overlooked the aspect that the defence is not required to prove its case of exercise of right of private defence to the hilt. Only probability has to be shown by the defence and, if that probability is shown, the benefit of that doubtful situation may be given to the accused, as per settled propositions of law.

4.1 It is also submitted that the other circumstances like conduct of the accused, conduct of witnesses, non-explanation of injury of the accused by the defence are also not properly considered.

4.2 It is submitted that the case of the appellant has consistently been that the deceased caused injury on his head with a blow of brick and as a reaction thereto, the appellant caused the injuries to the deceased. In the entire evidence of the prosecution, the prosecution has not explained as to how the injury was caused to the appellant. It comes on evidence that, during the course of investigation, it was revealed that the appellant had sustained injury on his head with brick and still no explanation is given by any of the witnesses in this regard while their statements were

recorded by the police. It is submitted that the prosecution witnesses do not stop there, but they improve upon their story during the course of their depositions and state that the appellant sustained injury on his head while he tried to escape from the place after the incident. This part was told by these witnesses, for the first time, when they entered the witness box. It is submitted that, it is not an innocent improvement, addition or omission on part of the witnesses. They added this part in their depositions only with a view to ensure that the accused-appellant fails in his plea of exercise of right of private defence. It is, therefore, submitted that non-explanation of injury on person of the accused may be viewed seriously.

4.3 It is also submitted on behalf of the appellant that the conduct of the appellant is relevant. After the incident, the appellant did not even attempt to escape from the place of incident. Once he was caught and made to sit on a side, he sat there till he was taken to hospital. If the appellant had deliberately murdered the deceased, he would have tried to escape from the place as a natural conduct of an ordinary man.

4.4 It is also submitted that plea of private defence can be raised at any point of time. It is not even required to be raised, but if a possibility is shown and the defence seems to be probable, the benefit has to be given to the accused-appellant.

4.5 It is submitted that from the deposition of the appellant himself and that of the Investigating Officer, it emerged during cross-examination that the accused-appellant had been injured with a brick by the deceased and, therefore, the plea of the appellant of exercise of right of private defence may be accepted and, resultantly, the appellant's conviction by the Sessions Court may be set aside and the appellant be acquitted of the charges levelled against him by allowing the appeal.

4.6 By way of alternative plea, it is canvassed on behalf of the appellant that, if the Court feels that the appellant has exceeded his right of private defence and the ingredients for exercise of right of private defence to the extent of causing death were absent, then also, the appellant can be said to have exceeded his right of private

defence and, if not clear acquittal, the conviction would be for an offence of culpable homicide not amounting to murder punishable under Section 304 of I.P.C.

4.7 In support of the aforesaid contentions, learned Advocates for the appellants relied on the following decisions :-

(1) Kesha and Others v. State of Rajasthan, AIR 1993 SC 2651.

(2) Dev Raj & another v. State of Himachal Pradesh, AIR 1994 SC 523.

(3) Haike and another v. State of M. P., AIR 1994 SC 951.

(4) State of Punjab v. Gurbux Singh and Others, 1995 Supp. (3) SCC 734.

(5) Wassan Singh v. State of Punjab, 1996 Cri. L.J. 878.

4.8 It is submitted that the evidence of eye-witnesses suffers from the vice of omissions and improvements made with a view to suit the prosecution case and with a view to mar the defence plea of exercise of right of private defence and, therefore, the appeal may be accepted, the judgment and order of conviction and sentence may be set aside and the appellant may be acquitted of

the charges or, in the alternative, the conviction may be altered to one under Section 304 of I.P.C. in place of 302 of I.P.C.

5. The appeal is opposed to by learned Additional Public Prosecutor, Mr. Bhate. According to Mr. Bhate, the Trial Court has properly appreciated the evidence and has recorded conviction. There are three independent eye-witnesses to the incident besides the widow of the deceased, who has also seen the incident. The case cannot fall within the ambit of exercise of right of private defence. Mr. Bhate submitted that the occurrence of the incident is divided into two parts, the first part occurred when there was a quarrel between the brothers and the brothers were separated and the second part occurred after some time when the appellant came with a knife from his house and without any reason caused knife injuries to the deceased, which proved to be fatal. Mr. Bhate, therefore, submitted that there was no question of nurturing the apprehension to the life of the accused.

5.1 The injury that was allegedly caused to the accused-appellant was only with a brick and was not a grievous hurt. The

appellant, therefore, could not have exercised the right of private defence much less to the extent of causing the death of the deceased. Mr. Bhate submitted that the story of the eye-witnesses is consistent. As against that, if the defence version is taken, Mr. Bhate submitted that the defence is consistently inconsistent, new theories are advanced during cross-examination of each of the witnesses and altogether new theory is advanced by the appellant-accused in his deposition on oath. No reason is shown to doubt the testimony of eye-witnesses. It is submitted that the Trial Court took into consideration all relevant aspects and recorded conviction and, therefore, the appeal may be dismissed.

5.2 Mr. Bhate has relied on following judicial pronouncements :-

(1) State of M.P. v. Ramesh, 2005 SCC (Cri) 1443.

(2) Babulal Bhagwan Khandare & Another v. State of Maharashtra, 2005 SCC (Cri) 1553.

5.3 It is submitted by Mr. Bhate that the involvement of the

appellant in the incident cannot be disputed by the appellant and the version of the eye-witnesses rule out the possibility of right of private defence being available to the appellant, least it being available to the extent of causing death of the deceased. The appellant caused fatal injuries to the deceased, which were found sufficient in ordinary course of nature to cause death of the deceased and conviction, therefore, was justified. Mr. Bhate submitted that the evidence of eye-witnesses cannot be thrown out only on the ground that the witnesses did not explain the injury on head of the appellant in their statement and came out with explanation, for the first time, in their deposition. This non-explanation or improvement may not be treated as deliberate or fatal to the prosecution case, particularly, when the evidence itself is not sustained. It is submitted, therefore, that the appeal may be dismissed.

6. We have gone through the record and proceedings and have considered the same in light of the contentions raised before us and the case law cited in support thereof.

7. As has been rightly contended, in this case, the question of occurrence of the incident and involvement of the appellant in the incident case is not in dispute. The appellant has broadly contended that because the deceased caused injury to the appellant on his head with a brick, he exercised his right of private defence, which resulted into the death of the deceased. In this regard, the details which are emerging from the suggestions made to the eye-witnesses and his case in his deposition would be of relevance. But, before considering the questions as to whether the appellant could have nurtured a reasonable apprehension giving him a right of self-defence extendable to causing death of the deceased and whether the appellant properly exercised that right or exceeded the same, it would be appropriate to refer to certain propositions of law, as are well settled.

8. Section 96 of the Indian Penal Code provides that nothing is an offence which is done in exercise of right of private defence. The proposition is further defined by provisions contained in Section 100, which deals with a situation where a right of private defence of the body exceeds to causing death. The said

section enumerates six situations, which would entitle a person to exercise the right of private defence of body, which can extend to causing death of the assailant. The first two of them are relevant, which provide that such right can be exercised, if an assault is committed on such person as may reasonably cause an apprehension that death will otherwise be the consequence of such an assault or that such an assault may cause a reasonable apprehension that grievous hurt will otherwise be the consequence of such an assault.

8.1 Section 102 of I.P.C. provides that right of private defence of body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed and it continues as long as such apprehension of danger to the body continues.

8.2 It is, thus, clear that, if an act is claimed to have been done in exercise of right of private defence of a person, the person taking such a plea has to show that there were circumstances

which caused a reasonable apprehension that his death was likely to be caused or grievous hurt was likely to be caused to him as a consequence of the assault unless he exercised his right of private defence extending to causing of death of the assailant. Such right would commence the moment a reasonable apprehension arises from an attempt or a threat to commit the offence and would continue as long as such apprehension of danger to body continues. There is no need to wait till that offence is committed by the assailant.

8.3 By virtue of provisions contained under Section 105 of the Evidence Act, when a person facing charges of criminal offence takes a plea that his case falls within any of the general exceptions in the I.P.C. or within any special exception or proviso contained in any other part of I.P.C. or in any law defining the offence, the burden of proving existence of circumstances and bringing the case within such exception is upon the person taking the plea. The section also provides that the Court shall presume absence of such circumstances.

9. With the above settled propositions of law, it will have to be examined whether, in the instant case, the appellant could have had a reasonable apprehension that, if he did not cause death of the deceased, the action of the deceased might result into death of the appellant or might result into causing of grievous hurt to the appellant. The next question would be whether the action taken by the appellant was just enough to protect himself from the apprehended death or grievous hurt or whether the act was in excess. The evidence has to be examined from this angle.

10. The prosecution has examined as many as 19 witnesses. Out of these 19 witnesses, depositions of P.W.2-Yunus Adam Talati (Exh.10), P.W.3-Yakub Umarji Kamal (Exh.11), P.W.14-Yusuf Vali Ibrahim Mindiwala (Exh.58) and P.W.15-Hanif Ibrahim Aakubat (Exh.59) are relevant so far as the incident is concerned. Since the incident is not in dispute and the other aspects are also not in dispute, the evidence of these witnesses would be relevant to examine whether there were circumstances leading to a reasonable apprehension of death or grievous hurt being caused by the

deceased to the appellant, as is claimed by the appellant and whether the appellant acted in exercise of his right of private defence and, if 'yes', whether he exceeded the same.

11. P.W.2-Yunus Adam Talati is the first informant. He says that the incident occurred on 11.11.1995. That he was standing near Undi Falia, at a corner. He was in company of Yunus Vali Mogra, Yusuf Mindiwala, Hanif Ibrahim Aakubat, etc. They noticed a quarrel between the appellant and his deceased brother, Vali Ahmed Dudhiya. He says that he was standing at a distance of about 12 to 15 feet from the place of incident. The witness says that he and Yusuf Mindiwala intervened between the two brothers and then the appellant went to his home on the upper storey. Thereafter, when the deceased was parking his hand-cart, the appellant came out from his house and inflicted knife blows on the deceased. The witness says that he was about 10 to 12 feet away, at that point of time. The injuries were caused on the left side of the trunk. Yunus Vali Mogra and the witness snatched away the knife from the appellant. The boys went to call Sarpanch. The Sarpanch came to the spot within 10 minutes. The appellant tried

to escape, but they caught hold of him. The appellant, while attempting to escape, fell on the floor and sustained injury on his head. Deceased Vali Ahmad was lying on the ground and was bleeding. He was alive. After the Sarpanch arrived, they took the deceased and the appellant to Bharuch Civil Hospital in auto-rickshaws. Both the rickshaws reached the Civil Hospital simultaneously. The deceased was examined by the doctor and was declared dead. The appellant was treated by the doctor. The witness says that he carried the knife with him to the hospital, which he had snatched away from the appellant. He handed over the same to the police at the Civil Hospital. The witness then identifies the knife, the clothes of the deceased and the appellant as well as footwear of the deceased.

11.1 During cross-examination to the defence, the witness asserts that though they were talking, their eyes were towards the place of incident as the appellant and the deceased were quarrelling. The witness says that, in the first incident, the appellant and the deceased were quarrelling in front of their house. The incident of knife occurred ten minutes thereafter. He also

states that, in the first incident there was a scuffle between the two brothers, which lasted for about 5 to 7 minutes. He says that, they had intervened and separated the two. He also says that he did not inquire about the cause of the quarrel. During cross-examination, he also states that, in the second incident, he saw that the appellant first assaulting the deceased with knife. This incident also occurred in front of the house of the appellant. The appellant came from the side and inflicted knife blow on the deceased when he was parking his hand-cart in a bent position. The witness says that the incident of giving knife blows occurred exactly at 5 minutes to 6 o' clock.

11.1.1 During cross-examination, a suggestion was put that the deceased had given blow with a brick to the appellant, which he denies. He also denies that because of the injury caused with the brick, the appellant fell down. He also denies the suggestion that when the appellant tried to get up, the deceased brought out a knife from his hand-cart and tried to cause injury to the appellant. He also denies the suggestion that, at that time, the

appellant gave a push to the deceased, as a result, the deceased fell down with the knife and in that transaction, sustained injury with the knife. He also denies the suggestion that the deceased pulled out the knife from his body and rushed towards the appellant with the knife. He denies that the appellant caught hold of the hand of the deceased and that there was a scuffle between the two and that, in that scuffle, the deceased sustained injury with knife. He denies the suggestion that the appellant did not cause any injury to the deceased with a knife.

11.2 The F.I.R. given by this witness is exhibited at Exh.21, which is consistent with the version given by this witness in his deposition.

12. The second important witness is P.W.11- Jebunvali, wife of Vali Ahmad, who is examined at Exh.50. She also claims to be an eye-witness to the incident. She says that the incident occurred on 11.11.1995 at 6 o'clock in the evening. She says that there was quarrel amongst the children on that day in the afternoon, between 3.00 P.M. and 4.00 P.M. The appellant is her

husband's elder brother. On the day of the incident, there was a quarrel between she and the wife of the appellant in the morning between 9.00 A.M. and 12.00 noon.

12.1 On the day of the incident, there was a quarrel between the appellant and her husband. At that time, Mogra Yunus, Mindiwala Yusuf and Ibrahim Kadu were present. These three persons separated the deceased and the appellant. The appellant was taken to his home and her husband came to their house. She says that the appellant and her family stay in the same house, the appellant stays on the first floor whereas they are staying on the ground floor. After drinking water, her husband went out to lock the hand-card. At that time, the appellant came out with a knife in his hand and inflicted two blows with the knife on her husband. The blows were given on left side of the body. Her husband fell down and was bleeding. His intestines had come out. She was stuck at the door. Many persons gathered. They tried to catch hold of the appellant and, in that transaction, the appellant fell down and sustained injury on his head with a stone. Sarpanch arrived and took her husband in a rickshaw to Bharuch Civil

Hospital. The appellant wanted to flee, but people caught hold of him. They took him to the Civil Hospital, Bharuch. Because she had given birth to a child only five days prior to the incident, she remained at home and did not go to Civil Hospital, Bharuch. She identified the knife and clothes of the deceased.

12.2 The witness is cross-examined at length. It is suggested to her that the appellant was working in the courtyard of the house, which she denies. She also denies the suggestion that the deceased inflicted injury on head of the appellant with a brick. She also denies that there was a scuffle between the two thereafter and, in that scuffle, the appellant sustained injury on his lips. She denies the suggestion that her husband (the deceased) brought a knife from the hand-cart and tried to assault the appellant with the knife. She denies the suggestion that the appellant, therefore, gave a push to her husband, as a result of which her husband fell down and suffered injury with the knife, which was in his hand. She also denies the suggestion that her husband got up after sustaining that injury, pulled out the knife and again tried to assault the appellant. She denies that the appellant caught hold of the hand of the

deceased and that there was a scuffle. She denies that, in that scuffle, her husband suffered second injury. She denies the suggestion that she has not seen the incident.

13. P.W.14-Yusuf Ibrahim Mindiwala is examined at Exh.58. In his examination-in-chief, he narrates the incident in the same manner as narrated by earlier witnesses and claims to have seen the same. The witness speaks of presence of the first informant, Hanif Aakubat, Yunus Mogra, etc. This witness is also cross-examined at length. During cross-examination, he states that he heard shouts of the female folk saying “rush, Vali is beaten”. He says that when he reached the house of the appellant, the deceased and the appellant were locked with each other. Their clothes were torn and were angry. He says that they made an attempt to separate them, but in vain. When other persons assembled, they were able to separate the two. He says that then he sent the appellant and the deceased to their respective houses.

13.1 He says in his cross-examination further that the first incident lasted for about 10 minutes and the second incident

occurred after about 10 minutes. He says that when he reached the place, Valibhai was lying on the ground. He assertively denies the suggestion that he did not see as to how Valibhai was injured. He says that he saw the injuries being caused to Valibhai from a distance of about 5 to 10 feet. The witness says that the appellant did not sustain injury on his head in the incident. He denies the suggestion that the injury on head of the appellant was caused by the deceased during scuffle in the second incident. He denies the suggestion that when he reached the place of incident, the knife was with Talati. He says that he saw the knife in the hands of the appellant. He says that when he reached the place of incident, the incident of giving knife blow was over.

13.1.1 The suggestions made during cross-examination regarding the deceased causing injury on head of the appellant with a brick resulting into the appellant falling down on the ground is denied. The witness denies the suggestion that the deceased apprehended that appellant would get up and assault the deceased and, therefore, the deceased brought the knife. He denies the suggestion that the appellant gave a push to the deceased, as a

result of which the deceased fell down and sustained injury with the knife in his own hand. He also denies that the deceased got up, pulled out the knife and tried to assault the appellant; and that the appellant caught hold of the hand of the deceased resulting into a scuffle and the deceased sustaining injury with the knife once again.

14. P.W.15-Hanif Ibrahim Aakubat is examined at Exh. 59. He also narrates the incident, in his examination-in-chief, in the same manner as earlier witnesses narrated the incident. During cross-examination, he says that the first incident was over when he came out of the house after drinking water. He asserts during cross-examination that he saw the incident of the appellant giving knife blows to the deceased. At that time, he was standing on the street just outside his house. He was in company of Yunus Mogra, Yusuf Vali and Yusuf Adam. He says that the second incident occurred some time after the first incident was over. Suggestions were put to this witness on the same lines as were put to the earlier witness, which were firmly denied by this witness.

15. The sum total of depositions of these four witnesses is that the incidents of quarrel on the day of the incident were two in number. On the first occasion, the two brothers quarrelled with each other, there was a scuffle between the two and the witnesses intervened and separated them. Both, the deceased and the appellant, went to their respective homes. The deceased was then parking his hand-cart when the appellant suddenly came out from his house and caused injuries with knife to the deceased resulting into his death. The suggestions regarding the deceased having assaulted the appellant with knife and having sustained accidental injuries with knife when the appellant gave a push to the deceased in an attempt to save himself are firmly denied by these witnesses. The suggestion that brick injury was caused in the second incident by the deceased is firmly denied by all the witnesses. The witnesses are independent witnesses, they are neighbours of the appellant and the deceased, their presence at the place of incident is natural and there is nothing to infer any animosity between the appellant and the witnesses. They would have no reason to falsely implicate the appellant or to give a false narration of the incident.

15.1 The Trial Court was, therefore, justified in holding that the prosecution evidence is sufficient to connect the appellant with the offence. The evidence is direct in nature and has remained unshaken when tested on the touchstone of cross-examination.

16. What further emerges from depositions of these witnesses is that there was a time gap of about ten minutes between the first incident and the second incident; and that in the second incident, brick injury was not caused by the deceased and, as such, the defence version that because of the brick injury, the apprehension of the appellant that his death might be caused or grievous hurt might be caused to him if he did not cause death of the assailant (the deceased) finds no material for its foundation. In this context, if deposition of the appellant, D.W.2 (Exh.83) is seen, he says on oath that the deceased gave a blow with a brick on his head, as a result of which he fell down and regained his consciousness after about half an hour. The deceased, therefore, felt that the appellant might beat him and he, therefore, brought out the knife from his house and started inflicting knife blows. He, therefore, gave a push to the deceased, as a result of which the

deceased fell down and sustained injury with the knife, which was in his hand. The deceased got up and again came to assault the appellant, the appellant again gave a push, the deceased again fell down and the second injury was caused.

16.1 Thus, even according to the appellant, the brick injury was caused, as alleged, by the deceased in the first incident, which was half an hour prior to the incident in question. Thereafter, there was no cause for apprehension of death or grievous hurt being caused by the appellant. The defence theory that the appellant acted in exercise of his right of private defence, therefore, cannot be accepted. Even if causing of injury by the deceased is accepted to have caused apprehension in the mind of the appellant, that episode was over when the two were separated by the witnesses. Thereafter, the apprehension of danger did not continue. And, therefore, the appellant cannot be said to have acted in reasonable apprehension. When the incident occurred, there was no threat to the appellant from the deceased. On the contrary, he came out with a knife and caused fatal injury t the deceased. The theory of deceased committing an assault with knife

on the appellant, the appellant giving a push to the deceased and the deceased sustaining injury with the knife while falling, the deceased again trying to commit assault on the appellant and the appellant again giving a push to the deceased and the deceased again sustaining injury is not accepted by any witness. To us also, it does not appear as possible if the site and nature of injuries are seen.

17. Much was argued on behalf of the appellant that the four so called eye-witnesses cannot be relied upon because they have improved their version. It was argued that all these witnesses have made similar and identical improvement in their version, it cannot be accidental and, therefore, this improvement is only with a view to scuttle the defence theory of exercise of right of private defence. The improvement is to the effect that the appellant sustained head injury when he fell down in his attempt to escape after the incident. It was argued that none of these witnesses have said this in their statement before police. However, we find that this omission is not properly proved, but all the same it emerges from cross-examination of the Investigating Officer that, during the

course of examination it was revealed that the appellant sustained head injury with a brick and that it was not revealed in course of examination that the appellant sustained head injury when he fell down while he was trying to escape after the incident.

18. It is true that there seems improvement having been made by these witnesses, which are consistent with each other, but the question is whether it goes to the root of the prosecution case, so as to render the prosecution case unbelievable or to render it doubtful. The witnesses are consistent, as stated earlier. The suggestions during cross-examination to the witnesses are not consistent with the version given by the accused in his own deposition and, therefore, the improvement cannot be considered as a strong factor to demolish the prosecution case. In our country, witnesses suffer from an apprehension of being branded as false witnesses and, at times, in an attempt to avoid such label being tagged to them, they add embroidery or a little frill of exaggeration in their deposition. The duty of the Court in such situation is, therefore, to separate the grain from the chaff, find out the truth and accept the same while discarding or neglecting such

exaggeration or improvements. In this regard, we may refer to the decision in the case of State of **U.P. v. Anil Singh, AIR 1988 SC 1998,** where the Apex Court has observed thus :-

> *"15. It is also our experience that invariably the witnesses add embroidery to prosecution story, perhaps for the fear of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the court to cull out the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence in the witnesses..."*

We do not find any substance in this contention and reject the same.

19. It was also argued that the prosecution has not explained the injuries on person of the appellant. The witnesses also improve upon the same when asked about it. In this regard, decisions of the Apex Court in the cases of **State of M.P. v. Ramesh, 2005 SCC (Cri) 1443 and Babulal Bhagwan Khandare**

and Another v. State of Maharashtra, 2005 SCC (Cri) 1553 may be referred to. It was observed that, "*number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as a universal rule that whenever the injuries are on the body of the accused person, the presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probablise the version of the right of private defence. Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries.*" It was observed that the burden is on the accused to show that he had a right of private defence which extended to causing of death.

19.1 As we have discussed earlier, in the instant case, the injury on head of the appellant cannot be considered to have been caused in the same transaction. There was a gap of at least 10 minutes, possibly half an hour, between the first incident and the second incident, even as per the case of the appellant. Eye-witnesses, barring P.W.11-Jebunvali (widow of the deceased), are independent, disinterested, consistent with each other and creditworthy. Their version, therefore, would outweigh the effect of omission on part of the prosecution to explain the injury on person of the appellant, though the witnesses have tried to explain during the course of their deposition. The appellant cannot be said to have discharged the burden of showing that he had a right of private defence which extended to causing of death.

20. Learned Advocate for the appellant relied on the decision in the case of **Wassan Singh v. State of Punjab, 1996 Cri. L.J. 878**, where firing a shot from gun was held to be an act of self-defence. However, if we examine the facts of the case, it can be noticed that the appellant in that case received as many as nine injuries, two of which were on vital part of the body, with one

incise wound on head with a sharp edged weapon, which was caused in the transaction of the incident. In the instant case before us, the position is different. The injury on head is admittedly caused in the first transaction and, therefore, the apprehension cannot be said to be well founded.

20.1 In the case of **Dev Raj and Another v. State of Himachal Pradesh, AIR 1994 SC 523**, relied on behalf of the appellant, it is held that the plea of right of self-defence cannot be lightly ignored and where two views are possible, the accused would be entitled to benefit of doubt. In the instant case, from the above discussion, it is clear that the evidence leaves no room for taking any other view so as to possiblise or probablise the plea of right of self-defence.

21. Now, examining the case from the angle suggested as an alternative plea that the appellant can, at the most, be said to have exceeded his right of private defence, it has to be observed that we are not inclined to accept the plea that he acted in reasonable exercise of his private defence on the basis of his

reasonable apprehension. There is no scope to infer existence of apprehension, leave aside a reasonable apprehension, when the first incident of causing head injury was over at least ten minutes back. When the second incident of the appellant causing fatal injury to the deceased occurred, there was no initiation of any action on the part of the deceased and, therefore, the question of considering whether he exceeded his right of private defence would not survive. We are of the view that the Trial Court has considered all relevant aspects in their correct perspective and in a legal manner, and the conviction for murder is rightly recorded.

22. So far as conviction for offence punishable under Section 135 of the Bombay Police Act is concerned, the notification is on record. The size of the knife is very relevant. The blade is of the size of seven and a half inch and, therefore, the conviction for that offence is also rightly recorded.

23. We find no reason to accept the appeal. The appeal, therefore, must fail and is dismissed. Judgment and order of conviction and sentence recorded by the Trial Court, which is

impugned herein, is hereby confirmed.

[A. L. DAVE, J.]

[BANKIM N. MEHTA, J.]

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